Filed 10/3/03 In re Isiah L. CA4/3

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

In re ISAIAH L. et al., Persons Coming Under the Juvenile Court Law.	
ORANGE COUNTY SOCIAL SERVICES AGENCY, Plaintiff and Respondent, v. JAVIER A., Defendant and Appellant.	G032097 (Super. Ct. Nos. DP006211, DP006212) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Richard E. Behn, Judge. Affirmed.

Kate M. Chandler, under appointment by the Court of Appeal and Richard Pfeiffer for Defendant and Appellant.

Benjamin P. de Mayo, County Counsel, and Ward Brady, Deputy County Counsel, for Plaintiff and Respondent.

Harry Zimmerman, under appointment by the Court of Appeal, for the Minors.

* * *

When the juvenile court finds the offer of proof of changed circumstances is inadequate to demonstrate sufficient changed circumstances to grant a petition pursuant to Welfare and Institutions Code section 388 (all statutory references are to the Welfare and Institutions Code, unless otherwise indicated), it does not abuse its discretion in refusing to conduct a full section 388 hearing. There is substantial evidence the children are adoptable, and no indication the court incorrectly analyzed the section 366.26, subdivision (c)(1)(D) exception. We affirm.

I

FACTS

The minors are four-year-old Isaiah L. and two-year-old Elias J. We restate the facts from our prior unpublished opinion in this case. (*Javier A. v. Superior Court* (Jan. 10, 2003, G031302) [nonpub. Opn.].)

"A petition alleging violations of Welfare and Institutions Code, section 300, subdivisions (b) and (g) was filed on February 26, 2002. (All statutory references are to the Welfare and Institutions Code, unless otherwise indicated.) Three days earlier the children, Isaiah, age three, and Elias, age ten months, were taken into protective custody by the Santa Ana Police Department after their father left them at their paternal grandmother's house on February 19, 2002, stating that he would be right back and did not return. The maternal grandmother told the police both parents were "into drugs" and often disappeared for days leaving the children with anyone who would watch them. Their mother had not been heard from in three weeks. The children's paternal grandmother called the police because she did not have medical consent and was unsure of paternity.

"The mother, Hayme L., has a lengthy criminal history according to records from the Bureau of Criminal Identification and Investigation. Since 1995, she has been

convicted of resisting a police officer, forgery, twice for receiving stolen property and twice for burglary. In addition, bench warrants have been issued when she failed to appear after promising to do so. Javier A., the father and petitioner, has a similar criminal history. He has been convicted of possession of a deadly weapon, contempt of court, disobedience of a court order, possession of narcotics paraphernalia, receiving stolen property and forgery.

"At the juvenile detention court hearing on February 27, 2002, the court ordered the children to be detained in a community care facility, while authorizing SSA to place the children if appropriate. The court ordered the agency to prepare a case plan pursuant to sections 358 and 358.1. On March 20, 2002, the children were placed with their maternal grandmother.

"SSA assigned the matter to its Absent Parent Search Unit. All possible leads were followed, but neither Hayme L. nor Javier A. were located. Notice of the jurisdiction hearing was sent by certified mail to all likely locations for each parent. The agency also conducted interviews of family members. Javier A.'s sister reported that he touched her vagina with his lips, and forced her to have sexual intercourse with him. The jurisdiction/disposition report states that allegations of sexual abuse were substantiated. SSA also found an existing warrant for Hayme L.'s arrest.

"On March 28, 2002, the court accepted the jurisdiction/disposition report into evidence, and declared the children dependents of the court. Two declarations from the Absent Parent Search Unit describing significant unsuccessful efforts to locate either parent were also filed. Neither parent was in court. The court found that reunification services need not be provided pursuant to section 361.5, subdivision (b)(1).

"Petitioner made his presence known to SSA on April 4, 2002. At that time, he was informed he would have to go to court if he wished to be determined to be the presumed father of Isaiah and Elias and receive services. But there is no indication he

took any action toward this end until August 9, 2002, when he was in custody, and again told of this procedure. During his time out of custody, Javier A. had no contact with his children, though he acknowledged a social worker told him where they were in early June 2002. His stated reason for not contacting them was that he was attending a substance abuse program in Ensenada, but had no proof he was there. Later he said he left the program in May 2002 because he missed the children.

"Pursuant to stipulation, the court appointed juvenile defenders to represent Javier A. for purposes of establishing paternity, authorized funds for transportation of him from jail to court and set a hearing on that matter for September 12, 2002. He was in jail for one year, serving sentences for first degree burglary, commercial burglary, making fictitious checks and grand theft. On September 12, 2002, the court found Javier A. to be the presumed father of the two children. He was then allowed monitored visitations with Isaiah and Elias while incarcerated.

"Concern developed over Isaiah's aggressive behavior. An underlying mood disorder was considered a possibility, and he was referred to a Community Child Guidance Center.

"In a September 23, 2002 written report to the court, SSA stated the children's mother had still failed to present herself, and their father was in jail for 365 days and would be unable to provide for the children's needs until August 2003 at the earliest. The recommendation was for the court to terminate reunification services, order suitable placement and schedule a 366.26 hearing.

"During an October 3, 2002, jail visit by the social worker, petitioner expressed remorse and requested visits, telephone calls and photographs of the children. He claimed he had attended parenting, substance abuse, healthy living and anger management classes. The social worker gave petitioner stationary with postage to write to his children.

"At the six-month hearing on October 7, 2002, the court found continued placement to be appropriate and necessary since there had not been substantial progress made toward alleviating or mitigating the causes necessitating placement or substantial compliance with the service plan. The court also found that reasonable services had been provided or offered to the parents and ordered reunification services terminated, noting that, should circumstances change, and petitioner was released from jail early, he would have the option of filing a petition under section 388."

On January 15, 2003, shortly after our previous opinion was filed, Orange County Social Services Agency (SSA) recommended the court conduct a permanency hearing under section 366.26. SSA requested the juvenile court find it is likely the children will be adopted, the rights of the children's parents be terminated and the children be referred to the county adoption agency for adoptive placement.

Javier A., the father, has remained incarcerated. He has had one visit with the children at Theo Lacy Jail. The children remained in the custody of their maternal grandmother who expressed concerns about her ability to adopt them because of "being overwhelmed and for financial reasons." Shortly after that, however, she fully committed to adopting both children.

On March 11, 2003, the children's mother, Hayme L., whose whereabouts were previously unknown, filed a petition under section 388, requesting the juvenile court to reinstate family reunification services for her and then schedule a 12-month review hearing. Hayme alleged she was enrolled in counseling and parenting classes as well and "twelve step meetings," and that she was committed to a "law abiding, drug free lifestyle which will have a positive impact on her children." In her March 4, 2003 declaration, Hayme declared she currently resided in a two bedroom apartment with several other adults, where she is provided a place to stay in exchange for doing housekeeping and laundry. In addition, she declared that, as a condition of probation, she had attended, as

of that date, six hours of Positive Parenting classes at Santiago Canyon College, had completed three parenting classes and one counseling session, attended twice-weekly Narcotics Anonymous classes and was testing negative for drugs and alcohol. She said she has monitored visitation with the children at the SSA offices.

Javier also filed a petition under section 388 on April 3, 2003. He requested the juvenile court reinstate family unification services and schedule an 18-month review. Javier declared he had been accepted in the Best Choice Program at Theo Lacy Jail where he participates in individual and group counseling, focusing on such subjects as anger management. He declared he had monthly visits with the children, and had frequent telephone conversations with them. He concluded that he would be released from custody on June 15, 2003, "and will be able to provide a loving home for my children."

On April 3, 2003, the juvenile court denied both parent's 388 petitions. The court then heard evidence and argument, and concluded that by clear and convincing evidence continued supervision was necessary, and that it is likely the minors will be adopted. The court ordered termination of parental rights. Finding it in the best interests of the children, adoption was also ordered. None of the section 366.26, subdivision (c)(1)(A) through (E) exceptions were found to apply.

Hayme did not appeal the judgment of the juvenile court. Javier filed a notice of appeal on April 8, 2003. In his appeal, Javier complains a hearing should have been granted on his section 388 petition, claims substantial evidence does not support the juvenile court's finding the children are likely to be adopted, and that section 366.26, subdivision (c)(1) was incorrectly analyzed by the juvenile court.

II

DISCUSSION

The father's 388 motion

A parent may, upon grounds of change of circumstances or new evidence, petition the court for a hearing to change, modify or set aside any order of the court previously made to terminate the jurisdiction of the court. (§ 388, subd. (a).) If it appears that the best interests of the child may be promoted by the proposed change of order or termination, the court shall order that a hearing be held. (§ 388, subd. (c).)

Juvenile courts have the discretion to summarily deny a hearing if it does not appear that the best interest of the child may be promoted by the proposed change or order. (*In re Zachary G.* (1999) 77 Cal.App.4th 799, 806; Cal. Rules of Court, rule 1432.) The juvenile court's denial will not be disturbed on appeal absent an abuse of discretion. (*In re Michael B.* (1992) 8 Cal.App.4th 1698, 1703-1704.) A hearing may be denied only if the application fails to reveal any change of circumstance or new evidence which might require a change of order. (*In re Aljamie D.* (2000) 84 Cal.App.4th 424, 431.)

Javier's motion, stating there were changed circumstances because he started an in-jail program a few weeks earlier was filed two months after the section .26 petition was originally scheduled to be heard. The juvenile court read the moving papers and heard argument from all counsel. The court concluded, "Well, with regard to father's 388, the court is going to deny it. Even if everything in the 388 was proved, the court would still not grant the 388."

We cannot conclude the juvenile court abused its discretion in refusing to conduct a full section 388 hearing, since the offer of proof was inadequate. The record reflected Javier had been convicted of possession of a deadly weapon, contempt of court, disobedience of a court order, possession of narcotics paraphernalia, receiving stolen

property and forgery in the past. His sister reported he touched her vagina with his lips and forced her to have sexual intercourse with him, and these allegations were substantiated. The children were initially taken into custody several days after Javier left them with their paternal grandmother, stating he would be right back. He has no record of successful completion of a drug rehabilitation program. He was currently in jail after being convicted of second-degree burglary and receiving stolen property. That the juvenile court was not impressed with Javier's professed good intentions, in light of his past record, is not surprising and certainly not an abuse of discretion.

Javier argues he was denied procedural due process when the juvenile court declined to proceed with a full hearing on his petition. He relies on *In re Jeremy W.* (1992) 3 Cal.App.4th 1407 and *In re Hashem H.* (1996) 45 Cal.App.4th 1791 to support this assertion. In *Jeremy W.*, the mother submitted evidence she had abstained from substance abuse for more than one year, had continued therapy at her own expense and had exhibited no psychological impediment to her parenting ability, in addition to evidence that Jeremy desired to be with his mother. These allegations were supported by declarations of a certified clinical psychologist who had previously been appointed by the court, with whom the mother continued to consult at her own expense. (*In re Jeremy W., supra,* 3 Cal.App.4th at p. 1413.) The petition in *Jeremy W.* contained significantly more than Javier's vague promises to change future behavior. The *Hashem H.* court concluded the mother had made sufficient showing to warrant a hearing after she produced evidence she participated in individual psychotherapy for more than a year, regularly visited her child and held a full time job. (*In re Hashem H., supra,* 45 Cal.App.4th at p. 1799.) The facts in *Hashem H.* differ considerably from those in the instant case where the father was incarcerated and had engaged in a few week's counseling. The denial of a full hearing did not amount to a denial of due process.

Juvenile court's finding the children are adoptable

Section 366.26, subdivision (c)(1) provides that if the court determines by clear and convincing evidence that it is likely the child will be adopted, the court shall terminate parental rights and order the child placed for adoption. The juvenile judge found, "I don't think there is any question from the evidence that the children are adoptable . . . ." Javier argues substantial evidence does not support the juvenile court's finding the children were likely to be adopted.

On appeal, the standard of review of a finding of adoptability is sufficiency of the evidence. (*In re Jennilee T.* (1992) 3 Cal.App.4th 212, 224.) Under the substantial evidence test, it is neither the duty nor the right of the appellate court to pass on the credibility of witnesses, resolve conflicts in the evidence or determine where the weight of the evidence lies. (*In re Megan S.* (2002) 104 Cal.App.4th 247, 251.)

The determination of the likelihood of adoption is whether the minor's age, physical condition and emotional state make it difficult to find a person willing to adopt the minor. (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649.) Physically, Isaiah and Elias are developmentally on target. Evidence was presented that Isaiah displays aggressive behavior and has other problems with socialization skills, such as temper tantrums, and that he might have a depressive disorder. Isaiah's adaptive behavior was rated within the low normal range which could change with improved parenting skills. Both children have engaging personalities and are good looking. SSA concluded it is "probable that they would be adopted but there would be some difficulty in placement for adoption since they are a sibling set." Substantial evidence supports the juvenile court's finding the boys are adoptable.

Javier asserts approval by the maternal grandmother to be an adoptive parent should be a prerequisite to the termination of parental rights "because otherwise it is impossible to determine whether a defense exists to the termination of parental rights

pursuant to section 366.26, subdivision (c)(1)(D)." He does provide a citation to support this argument, but it is not on point. Respondent's brief points out the lack of authority, but Javier did not remedy the omission by providing any explanation or authority in his reply brief.

In fact, section 366.26, subdivision (c)(1) seems to moot this argument. That section states the fact that a child is not yet placed in a preadoptive home with a relative or foster family who is prepared to adopt "shall not constitute a basis for the court to conclude that it is not likely the child will be adopted." (§ 366.26, subd. (c)(1).) More directly on point with regard to the mootness of this assertion is that the maternal grandmother has "made a final decision to adopt the children." This contention is rejected.

Unwilling caretaker

Another argument of Javier is that substantial evidence does not support the juvenile court's finding that section 366.26, subdivision (c)(1)(D) did not apply. That section provides that the juvenile court may find termination of parental rights detrimental to a child if certain circumstances exist. One of those circumstances is when a "child is living with a relative . . . who is unable or unwilling to adopt the child because of exceptional circumstances, that do not include an unwillingness to accept legal or financial responsibility for the child, but who is willing and capable of providing the child with a stable and permanent environment and the removal of the child from the physical custody of his or her relative . . . would be detrimental to the emotional well-being of the child." (§ 366.26, subd. (c)(1)(D).)

Once again, Javier's point is not apparent. He seems to be arguing there is not substantial evidence to support a negative. The maternal grandmother, while she did have some concerns about undertaking permanent care for the two little boys in the past,

overcame her previous reticence and has committed to adoption. Thus, the juvenile court was not faced with an unwilling caretaker. This argument also fails.

Postjudgment evidence

Both minors' counsel and appellant request this court receive post judgment evidence. We decline to consider post judgment evidence. (*In re Zeth S.* (2003) 31 Cal.4th 396, 407-414.) Accordingly, all motions to consider postjudgment evidence, as well as minors' motion for leave to reply to the third motion to take evidence, are denied.

III

DISPOSITION

Judgment is affirmed.

MOORE, J.

WE CONCUR:

SILLS, P.J.

RYLAARSDAM, J.